82-671

No.

Office - Supreme Court, U.S.
FILED
OCT 15 1982
ALEXANDER L. STEVAS
CLERK

In the Supreme Court of the United States

OCTOBER TERM, 1982

WALTER OGGOIAN,

Petitioner,

vs.

UNITED STATES OF AMERICA,

Respondent.

PETITION FOR WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE SEVENTH CIRCUIT

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QUESTIONS PRESENTED

I. Whether a criminal conviction may be sustained where government counsel elicited trial testimony that defendant had exercised his right to remain silent, without a determination by the reviewing court that the constitutional error was harmless beyond a reasonable doubt?

II. Whether, in the context of a prosecution charging defendant with filing income tax returns which he did not believe to be true and correct as to every material matter, it is a denial of due process for the court to refuse to instruct the jury that defendant's belief regarding the truth or falsity of the returns is an element of the offense?

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OPINION BELOW

The opinion of the Court of Appeals for the Seventh Circuit was entered on May 11, 1982. It is reported at 678 F.2d 671, 7th Cir., 1982, and is set forth herein at Appendix A-1, infra. The petition for rehearing with suggestion for rehearing *en banc* was denied on September 15, 1982, and that order is set forth herein at Appendix A-7.

JURISDICTION

This petition for certiorari is sought under 28 USC §1254(1). The petition was filed within sixty days after denial of the Petition for Rehearing in the Court of Appeals on September 15, 1982, in conformity with Rule 20.1 of this Court.

CONSTITUTIONAL PROVISIONS INVOLVED

Amendment V to the Constitution of the United States

No person shall be held to answer for a capital, or other infamous crime, unless upon a presentment or indictment of a Grand Jury . . . ; nor shall any person . . . be compelled in any criminal case to be a witness against himself, nor be deprived of life, liberty, or property, without due process of law.

Amendment VI to the Constitution of the United States

In all criminal prosecutions, the accused shall enjoy the right to a speedy and public trial, by an impartial jury of the State and district wherein the crime shall have been committed, which district shall have been previously ascertained by law, and to be informed of the nature and cause of the accusation; to be confronted with the witnesses against him; to have compulsory process for obtaining witnesses in his favor, and to have the Assistance of Counsel for his defense.

26 USC §7206(1)

Any person who—

(1) Declaration under penalties of perjury. — Willfully makes and subscribes any return, statement, or other document, which contains or is verified by a written declaration that it is made under the penalties of perjury, and which he does not believe to be true and correct as to every material matter; . . . shall be guilty of a felony * * *.

STATEMENT

The petitioner, who did not testify in his own behalf, was convicted by a jury in the Northern District of Illinois, Eastern Division, on all counts of a three count indictment charging him with wilfully and knowingly filing tax returns which he did not believe to be true and correct as to every material matter for the years 1974, 1975, and 1976, in violation of 26 USC §7206(1). On August 14, 1981, he was sentenced to concurrent one year terms of imprisonment and a $5,000.00 fine on each of the three counts. The Court of Appeals for the Seventh Circuit affirmed the conviction on May 11, 1982, and a petition for rehearing with suggestion for rehearing *en banc* was denied September 15, 1982.

The Court of Appeals held that any error in the trial court allowing testimony from a government agent which reflected negatively on petitioner's exercise of his right to remain silent, was harmless error when viewed in the context of the trial as a whole.

It also held that the charge to the jury was sufficient as to the essential elements of the offenses, even though the jury was not told that one of the essential elements was that petitioner did not believe his returns to be correct as to every material matter.

During the course of trial the prosecutor elicited from Internal Revenue Special Agent Pinta testimony about an interview wherein he had warned the petitioner that he had a right to remain silent, after which petitioner answered a few questions. The prosecutor then posed this question to the witness in the presence of the jury:

> "Did he say anything else to you?"

The agent replied:

> "He refused to answer any further questions." (TR 281.)

The court charged the jury on the elements of the offense in the following language:

> Now, to prove the charge that is contained in each of these three counts of the indictment, the government must establish each of four propositions beyond a reasonable doubt.
>
> The first one is that the defendant made or caused to be made and that the defendant signed the federal tax return for the year in question, an income tax return. The second element that has to be proved is that the tax return was false as to a material matter. That is, it contained an understatement of adjusted gross income.
>
> Third, that when the defendant made, or caused to be made, and when the defendant signed the return he did so willfully and knowingly.
>
> Fourth, that the return contained a written declaration that it was made under the penalty of perjury.
>
> It is not enough for the government to prove simply that the tax return is erroneous. *If you find from your consideration of all the evidence, that each of the four numbered propositions has been proven beyond a reasonable doubt as to any count of the indictment, then you should find the defendant guilty of that count.* If, on the other hand, you find from your consideration of all the evidence that any of those propositions has not been proved beyond a reasonable doubt as to any count of the indictment, then you should find the defendant not guilty as to that count. (TR 514-515.) (Emphasis supplied.)

The defense proffered an instruction which encompassed the element of the defendant's belief in the correctness of his returns, but this was refused. As a result no instruction was given on the issue of petitioner's belief in the truth or falsity of his returns.

This writ is sought on the basis of rulings by the Court of Appeals in disregard of and in direct conflict with the constitutional mandates of this Court.

REASONS FOR GRANTING THE WRIT

I. The Court of Appeals, in Affirming Petitioner's Conviction Despite the Admission of Testimony that He Had Exercised His Constitutional Right To Remain Silent, Failed To Apply The Controlling Standard That Constitutional Error Can Be Upheld As Harmless Only Upon Proof Beyond A Reasonable Doubt.

A government agent stated in the presence of the jury that petitioner ". . . had refused to answer any further questions" (TR 281). The agent should have known that it was improper to tell the jury that petitioner had exercised his constitutional privilege to remain silent, and government counsel obviously must be held to know that it was improper. Thus the best that can be said of this incident is that the government acted with reckless disregard for petitioner's right to due process of law.

This Court long ago established the principle that a criminal defendant has a constitutional right to protection against adverse inferences drawn from the exercise of his right to remain silent. *Griffin* v. *California*, 380 U.S. 609 (1965). Hence the question in this case is not whether error occurred but whether that error requires petitioner's conviction to be set aside. In addressing that issue the Court of Appeals disregarded the test prescribed by controlling decisions of this Court, thus putting Seventh Circuit precedent at odds with this Court's authoritative interpretation of the Fifth Amendment.

The Court of Appeals ruled that any error in Agent Pinta's testimony ". . . was harmless when viewed in the context of the trial as a whole" (App. A-3). Thus the court simply evaluated the prejudicial effect of the error, then balanced it against what the court deemed to be the

weight of the evidence against petitioner. That approach is clearly deficient. Where constitutional error is present the court is not to be concerned

> ". . . with whether there was sufficient evidence on which the petitioner could have been convicted without the evidence complained of. The question is whether there is a reasonable possibility that the evidence complained of might have contributed to the conviction." *Fahy* v. *Connecticut*, 375 U.S. 85, 86-87 (1963).

In cases where defendant's due process rights have been abridged by disclosure of his exercise of the right to remain silent, the conviction may be sustained only upon a determination that the error was harmless beyond a reasonable doubt. *Chapman* v. *California*, 386 U.S. 18 (1967).

Chapman and *Fahy* do not permit the court to focus upon the weight of admissible evidence against a defendant. Instead, they require the government

> ". . . to prove beyond a reasonable doubt that the error complained of did not contribute to the verdict obtained." *Chapman*, 386 U.S. at p. 24.

The Court of Appeals clearly departed from this standard. It is stated in the opinion that ". . . Agent Pinta's testimony was but a small part of the evidence presented", and that the error was harmless "in the context of the trial" (App. A-3). These references show that the Court erroneously focused, not upon the prejudicial effect of the improper testimony, but upon the strength of other evidence received against petitioner.

We submit that a precedent clearly misapplying a constitutional principle of such magnitude as that involved in this case should not be permitted to stand.

II. The Instructions Denied Due Process To Petitioner In That They Failed To Address The Elemental Issue Of His Belief In The Truth Or Falsity Of His Returns.

It is fundamental that a defendant may not be convicted of a crime except upon proof beyond a reasonable doubt of every fact necessary to constitute the offense charged. *In re Winship*, 397 U.S. 358 (1970); Amendment V, U.S. Constitution. It is equally well established that these factual issues are to be determined by the jury. See, e.g., *Duncan* v. *Louisiana*, 391 U.S. 145, 155-156 (1968); Amendment VI, U.S. Constitution. To ensure this vital protection, a defendant is entitled to an instruction on each essential element of the offense charged, even if he does not request it, all the more so when he does request it. *Screws* v. *United States*, 325 U.S. 91 (1941).

This Court has held that a conviction under 26 USC §7206(1) requires proof that defendant signed his "tax returns knowing them to be false" and did so wilfully. *United States* v. *Pomponio*, 429 U.S. 10, 11 (1976) (footnote excluded).

The statute, 26 USC §7206, reads as follows:

> "Any person who . . .
> "willfully makes and subscribes any return, statement or other document which contains or is verified by a written declaration that it is made under penalties of perjury and *which he does not believe to be true and correct* as to every material matter; * * * shall be guilty of a felony . . . (Emphasis added.)

Petitioner tendered an instruction which stated among the essential elements of the offense:

> "That defendant did not believe those returns to be true and correct as to the material matter charged in the indictment." (Def. Instr. No. 08.)

The district court refused the instruction on the ground that the quoted statement was similar to language in another part of the same tendered instruction (TR 309). The court then gave an instruction on the elements of the offense which completely omitted the subject of petitioner's belief regarding the falsity of the return:

> Now, to prove the charge that is contained in each of these three counts of the indictment, the government must establish each of four propositions beyond a reasonable doubt.
>
> The first one is that the defendant made or caused to be made and that the defendant signed the federal tax return for the year in question, an income tax return.
>
> The second element that has to be proved is that the tax return was false as to a material matter. That is, it contained an understatement of adjusted gross income.
>
> Third, that when the defendant made, or caused to be made, and when the defendant signed the return he did so willfully and knowingly.
>
> Fourth, that the return contained a written declaration that it was made under the penalty of perjury.
> It is not enough for the government to prove simply that the tax return is erroneous. *If you find from your consideration of all the evidence, that each of the four numbered propositions has been proven beyond a reasonable doubt as to any count of the indictment, then you should find the defendant guilty of that count.* If, on the other hand, you find from your consideration of all the evidence that any of those propositions has not been proved beyond a reasonable doubt as to any count of the indictment, then you should find the defendant not guilty as to that count. (TR 514-515.) (Emphasis supplied.)

It is plain from the face of the statute that, for a violation to occur, a person must believe that the return is ma-

terially false. The instruction given by the trial court directed the jury to return a verdict of guilty if it found that the government had proved defendant knowingly and wilfully signed his name to a false return. All that was necessary, according to these instructions, was that: 1) he performed the act of signing his name knowingly and wilfully, and that 2) the return was false as to a material matter. The court's refusal to instruct on defendant's belief as to the truth or falsity of his returns removed that issue from jury consideration. There was simply no instruction which told the jury that the government must prove and the jury must believe beyond a reasonable doubt that the defendant knowingly and wilfully signed his name to a return which he *believed to be false or incorrect.* This in spite of this Court's holding in *Screws* v. *United States,* 325 U.S. 91 (1944), that in cases where intent is at issue, the jury must be instructed specifically on that question and the government's burden in relation to it. See also *Morissette* v. *United States,* 342 U.S. 246, 274 (1952).

The Court of Appeals affirmed the conviction on the basis that "the charge as a whole covered the essential elements of the offenses, including knowledge of the appellant that the returns were false as to material matters" (App. A-5). This holding is incorrect for two reasons:

1. There was no specific instruction which told the jury the government must prove beyond a reasonable doubt that petitioner believed he signed materially false tax returns.

2. The additional instructions which the Court of Appeals relied on "as a whole" related to affirmative defenses raised by defendant. None of them related to what defendant believed at the time he signed his returns nor the government's burden of proof on that issue. Even if the

jury were able to somehow understand the instructions "as a whole", the instructions in their entirety cannot supplant or be substituted for a specific instruction on defendant's belief in the truth or falsity of his returns. Its omission was clear error, and the effect of that omission was to deprive petitioner of his right to a jury trial on every element of the offense.

We submit that the question is an appropriate one for the exercise of certiorari jurisdiction. The error is so fundamental that the Court should seize the occasion to reaffirm the principle that criminal convictions cannot stand where the right to trial by jury has been denied or abridged by failure of the instructions to deal with every element of the offense.

CONCLUSION

Petitioner respectfully requests that, for the reasons heretofore adduced, this Court issue its writ of certiorari to the United States Court of Appeals for the Seventh Circuit and reverse the judgment below.

Respectfully submitted,

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